

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUAN JOSE GARCIA,

Defendant-Appellant.

UNPUBLISHED

March 22, 2005

No. 252933

Shiawassee Circuit Court

LC No. 03-009576-FC

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f). Defendant was sentenced to concurrent prison terms of twenty-five to forty years on each conviction. We affirm.

The testimony adduced at trial established that defendant, his sister, their cousin, and the victim in this case were at defendant's sister's apartment drinking, playing dice, and listening to music on the night the victim was assaulted. At trial, the victim testified that when she went to use the bathroom, defendant followed her into the bathroom. She testified that defendant picked her up and placed her on the sink where he orally and vaginally penetrated her. Defendant testified that the sexual contact was consensual.

Defendant first argues that the trial court shifted the burden of proof when it explained the process of preliminary examination to the jury. We disagree. Because no objection was raised at trial to the trial court's remarks at trial, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

"The burden of proof in a criminal case may not be placed on the defendant and instructions of the trial judge susceptible of any such interpretation are erroneous." *People v Hudson*, 123 Mich App 624, 625; 333 NW2d 12 (1982). Therefore, a trial court errs in explaining the purpose of a preliminary examination to a jury if it in effect, tells the jury that there is probable cause to believe the defendant is guilty. *Id.*

In this case, the trial court tangentially referred to the process of preliminary examination while attempting to explain what an Information is. However, defendant waived preliminary examination in this case, as was explained to the jury. Therefore, the trial court did not instruct the jury that there was probable cause to believe defendant was guilty because of the preliminary

examination procedure. Accordingly, the court did not shift the burden of proof to defendant to prove his innocence. In addition, the trial court repeatedly told the jurors that the burden was on the prosecution to prove defendant's guilt beyond a reasonable doubt, that the Information was not evidence, that an Information is presented in every criminal trial, and that they should not draw an inference of guilt just because defendant was charged with a crime.

Thus, read as a whole, the trial court's instructions fairly presented the issues to be tried, sufficiently protected defendant's rights, and properly placed the burden of proof on the prosecution. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Accordingly, defendant has failed to show that the trial court's description of the process of preliminary examination was plain error affecting his substantial rights. *Carines*, *supra* at 764.

Defendant next contends that the prosecutor violated his Fifth Amendment¹ right against self-incrimination when during voir dire he commented that it is more difficult to determine the facts of an event you did not see when "somebody isn't saying 'I did this.'" Because no objection was raised to the prosecutor's comment at trial, we again review for plain error affecting substantial rights. *Id.*

"A defendant in a criminal case has a constitutional right against compelled self-incrimination and may elect to rely on the 'presumption of innocence.'" *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995) (citing US Const, Am V; Const 1963, art 1, § 15). Thus, a prosecutor may not comment on a defendant's failure to testify. *Id.* Defendant admits that the prosecutor's comment in this case was not a comment on his silence (defendant actually testified at trial), but argues that as a comment on his claim of innocence, it violates his right against self-incrimination. We disagree. The prosecutor's comment only emphasized for the jury what was obvious by the fact that defendant was being tried, i.e., that defendant had not confessed to the commission of a crime. Moreover, immediately after making the statement the prosecutor noted that it was his burden to prove beyond a reasonable doubt that defendant was guilty of the crimes charged, a fact that the trial court repeated throughout the proceeding. In context, the prosecutor's comment did not amount to plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631.

Finally, defendant contends that the cumulative effect of the two alleged errors discussed above denied him of his right to a fair trial. Because we find no actual error in the trial court's remarks or the prosecutor's comment, there can be no cumulative effect that denied defendant his right to a fair trial. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

Affirmed.

/s/ Joel P. Hoekstra

/s/ Janet T. Neff

/s/ Bill Schuette

¹ US Const, Am V.